IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-332

JAMES A. RHODES, et al.,

Petitioners,

vs.

KELLY CHAPMAN, et al.,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE STATE PUBLIC DEFENDER OF CALIFORNIA IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS

The State Public Defender of California hereby respectfully moves for leave to file the attached brief *amicus curiae* in support of Respondents. The consent of the attorney for Respondents has been obtained; a letter reflecting such consent has been forwarded to the Clerk under separate cover, and should be on file in his office. The consent of the attorney for petitioner has also been requested. However, notwithstanding the fact that petitioners' position has been supported by *amici curiae* from 30 states, consent to the filing of this brief was refused.

The State Public Defender of California is an agency of California state government which is charged with the respresentation on appeal of indigent criminal defendants, most of whom are inmates of the state prisons of California. *Amicus* is therefore vitally concerned that conditions in such prisons be consistent with elementary standards of human decency as embodied in the Eighth Amendment. *Amicus* also wishes to inform the Court of the impact a ruling herein will have on the state of California, the nation's largest state and the state having the largest single population of prisoners.

For this reason, we seek the Court's permission to file the attached brief *amicus curiae.*

Respectfully submitted,

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I

"FEDERALISM" IS NOT A CLOAK BEHIND WHICH STATES MAY INDEFINITELY EXPAND PRISON POPULATIONS WHILE REFUSING TO PROVIDE SUFFICIENT FACILITIES TO PERMIT THOSE IMPRISONED TO LIVE CONSISTENT WITH MINIMUM STANDARDS OF HUMAN DECENCY

INTRODUCTION

California, doubtless not unlike many of the other jurisdictions who appear here as *amici curiae* [1] has seen a

recent and dramatic increase in the number of inmates in its state prisons. In California—a state which has been said to already have as many convicts as any other whole nation except the Soviet Union and South Africa—the recent increase in prison population is directly attributable to the passage of an unprecedented series of statutes enacted beginning in 1977.

1977 is the year in which the California Legislature abolished the previous indeterminate sentence system and instituted a new determinate sentencing scheme which expressly disavowed [2] rehabilitation as a goal of imprisonment.[3] The California Legislature has gone on to make it mandatory for an abundance of offenses, including a variety of drug offenses (Cal Pen C. § 1203.07), a variety of sex offenses (Cal Pen C. § 1203.065), a variety of offenses where the victim is age 60 or older or physically handicapped (Cal Pen C. § 1203.09) and a variety of offenses where a firearm is used (Cal Pen C. § 1203.06).

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[1] See Brief of the State of Oregon and 29 others as *amici curiae* in support of Petitioner.

[2] Cal. Pen. C. § 1170; see generally Cal. Stats. 1977 Ch. 1139 as amended by Cal Stats. 1977 Ch. 165, both operative July 1, 1977.

[3] See fn [2], ante; *In re Foss* (1974) 10 Cal 3d 910, 923; 112 Cal Rptr 649: "It is well established that the purpose of the [repealed] indeterminate sentence provisions in California's criminal law is to mitigate the punishment which would otherwise be imposed . . . More importantly, as stated in [*In Re Lee* (1918) 177 Cal 690, 692, 171 P.2d 958] 'These laws place emphasis upon the reformation of the offender. They endeavor to put before the prisoner great incentive to well doing . . . Instead of trying to break the will of the offender . . . the purpose is to strengthen his will to do right . . .' "

On top of this trend to mandatory, non-rehabilitative sentences, other bills have been enacted which dramatically increase the length of those sentences.[4] Terms for sex offenses been extended even further—to the point where rape can be punished more severely than many forms of homicide—and limitations on consecutive sentencing have also been removed.[5]

While the Governor's office has made separate and so far ineffective efforts to build more prisons, it is notable that not one of this plethora of enactments has appropriated a single penny to pay the cost of imprisoning additional persons for longer periods. Moreover, all current indications are that the California Legislature's orgy of increased, mandatory prison terms is not about to abate. As the result of political changes wrought by the 1980 election, key legislative committees have been stacked with legislators who are heavily committed to the passage of more bills of this nature.[6]

Perhaps ironically, one California Legislator, himself the author of the single most sweeping penalty-increase

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[4] Cal Sen. Bill 709 (1978) Cal Stats. 1978 Ch. 579.

[5] Cal. Sen. Bill 13 (1979) Cal Stats. 1979 Ch. 944.

[6] A recent news account describes the situation thusly: "The new Assembly Criminal Justice Committee will be a 12 member panel with a freshman majority and six predictably or avowedly conservative members. . . . Members . . . will be four Republican freshmen (names omitted) all acknowledged conservatives on crime issues. . . . [T]hey will be joined by freshmen Democrat Jim Cramer of Upland, a former District Attorney, and veteran Democrat Alister McAlister of San Jose, author of some of the Legislature's most punitive crime bills. . . ." *Justice Unit Shifts Right*, The Sacramento Bee, Jan 10, 1981 Pg. A-13 col 4.

bill since 1976,[7] has now come to warn publicly that the overcrowding of California prisons has now reached such a dangerous point as to portend another New Mexico or Attica-type holocaust in California.

> "An explosion is building", says Sen. Robert Presley (D-Riverside), frustrated by the Legislature's refusal to build more prisons at a time it is passing more laws requiring judges to put more criminals in prison for longer terms. "We're running the risk of a New Mexico or an Attica (where overcrowding contributed to violent prison riots that killed inmates and destroyed buildings)", adds Presley, Gov. Brown's chief compaigner in the Legislature for more money for prisons.
>
> "We're three or four years behind schedule now, and you're probably going to see even tougher anti-crime legislation passed this year. . . ."[8]

It is against such a real-world background that this Court is asked by Ohio and 30 other jurisdictions who appear as *amici curiae* to erect the banner of "federalism" as a cloak behind which they might conceal failures to act in a manner consistent with human decency toward those they choose to imprison.[9] Their argument borders on the facetious and the grotesque when they urge,

> "A minimum requirement for scrutiny under the eighth amendment is that the pain inflicted be the kind which hurts in a sharp or acute way . . . [The

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[7] Cal. Sen. Bill 709 (1978), fn. *4, ante.*

[8] *Prison Riots: Worsening Cell Shortage Threatens Upheavals,* The Sacramento Bee, Jan. 4, 1981 Pg. A-22, Col 1.

[9] Brief of Oregon and 29 others as *Amici Curiae,* p. 3 and *passim.*

> eighth amendment] does not require that the state house prisoners in the Hay-Adams and enroll them at Georgetown because they would otherwise 'unnecessarily' be discomfitted. . . .
>
> "It has been suggested, but never squarely held, that the eighth amendment prohibits severe mental as well as physical pain . . . If the kind of physical pain proscribed by the eighth amendment is that which hurts . . . the appropriate psychological analogue is mental pain that hurts. The paradigm of such mental anguish is the effect of a Chinese Water Torture." Brief of *Amici Curiae,* pp. 16–18.

But how psychologically "painful" might it be to be locked down for days at a time in a broom-closet size cubicle with someone who is waiting for an opportunity to kill you as soon as you fall asleep? How physically painful is it for a prisoner to have his head sawed off or be burned to death with a blowtorch by other prisoners engaged in a riot induced by the tortuous psychological pressures which result from overcrowding?

Anyone who has taken a course in freshman psychology knows that if too many laboratory hamsters are jammed into a cage, the lack of space breeds a severe degree of tension which, having no other outlet, is turned back upon the other residents of the cage. Often, the results are fatal. Human beings, of course, have the same elemental needs as hamsters, and should be treated by the state with at least the same degre of consideration as would be dictated by standards for the humane care of animals.

"Federalism" certainly prevents this or any federal court from prescribing for the states the exact number

of years which they may impose for a given felony. (Cf. *Rummel* v. *Estelle* (1980) __ U.S. __ 100 S.Ct. 1133.) Federalism likewise does not permit the federal courts to direct the states to operate their prisons so they resemble private universities or luxury hotels—and *amici's* veiled suggestion that any federal judge has ever contemplated such bubblebrained notions is clearly an insult to both the federal judiciary and the Bill of Rights.

Federalism does, however, require that the states act responsibly and within the framework of elemental constitutional standards as they exercise the broad discretion afforded them under the Tenth Amendment. So, if Ohio, California or any other state wishes to send large numbers of persons to prison for long periods of time, with or without rehabilitation being a goal of that imprisonment, then the Legislatures of those states must be prepared to pay the price of such choice by providing living conditions to those imprisoned which are consistent with minmum standards of human decency; conditions wherein prisoners will not be driven crazy or placed in constant jeopardy of assassination by other prisoners, for example. (See *Hutto* v. *Finney* (1978) 437 U.S. 678; *Bell* v. *Wolfish* (1979) __ US. __, 99 S.Ct. 1861.)

Since respondents have never asked for anything more than this, and since the courts below have never granted anything more than such a minimal level inquiry, Respondents are clearly entitled to prevail.

A. The Standard of Review Applicable to Challenges to Conditions of Confinement in a Prison is Whether or not the Totality of Conditions Constitute Cruel and Unusual Punishment

Although the federal judiciary retains its traditional reluctance to interfere with the running of correctional institutions, this "hands off" doctrine has long since ceased to be the cloak behind which prison officials can seek refuge from judicial review of the administration of their facilities. As this court recently noted, "There is no iron curtain drawn between the Constitution and the prisons of this country." (*Wolff v. McDonnel,* 418 U.S. 539, 555–56, 94 S.Ct. 2963, 2974, 41 L.Ed.2d 935 (1974).) Moreover,

> "... a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison [condition] regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." (*Procunier v. Martinez,* 416 U.S. 396, 405–06.)

Similarly, a state's fiscal limitations or legislative reluctance to undertake the steps necessary to alleviate inadequacies in a prison system have not precluded the federal courts from scrutinizing a facility to determine if it complies with basic constitutional guarantees. As Chief Justice Burger recently acknowledged in his 1980 State of the Judiciary Address, the recent outbreak of violence in New Mexico was not unique. Nearly half of the states currently maintain a prison population that is too large for existing facilities. Prison officials every-

where feel it is only a matter of time before similar outbreaks will occur.

> ". . . specifically, we must focus more attention on the conditions of incarcerated persons . . . When the trial is over we simply cast the guilty into nineteenth century penal institutions". . . .[10]

The 1970's saw some encouraging efforts to redress this imbalance, in large part because of the realization that if those responsible for ensuring decent and responsible correctional administration fail to do so, the courts reach the point where there is no choice but to act.

Especially in these times, it is critical that the federal courts do not shirk their responsibility for protecting the basic constitutional rights of incarcerated persons. The prisons of California, as well as those of many other states, are rapidly reaching and exceeding their capacity. Faced with diminishing resoures, state officials will be sorely tempted to let prison conditions deteriorate until they reach an inhumane level. Prisoners wield no political power; they elect no state legislators. Thus, in all probability it will be left to the federal courts to prevent prisons from further turning into dungeons.[11]

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[10] 1980 State of the Judiciary Address, as reported in the Los Angeles *Daily Journal,* December 21, 1980, p. 13. See Wright v. Enomoto (N.D. Cal. Nov. 3, 1980, Docket No. C-73-1422 S.A.W.) Deposition of George F. Sumner, Warden of San Quentin, p. 5 (hereafter referred to as Deposition of George F. Sumner), in this deposition, Mr. Sumner expresses sentiments similar to those of the Chief of Justice.

[11] It is also worth noting that California prisons were being characterized as "disgraceful dungeons" even before the current overcrowding crisis, and even before the state's formal abandonment of rehabilitation. Murray, *Prison Reform: Backward or Forward* (1975) 50 Cal.St.Bar.J. 357, 361.

Specifically in California, correction administrators have acknowledged that double celling is due to an ever increasing, younger, and more volatile prison population.[12]

Over a 24 year period California has seen a constant shift in the inmate profile. The shift has changed from a population comprised of mostly non-violent property offenders to those incarcerated for crimes against persons. Currently, 11,063 inmates are incarcerated for homicide, robbery, rape or assault as compared to a counterpart of 3,652 in 1951. This represents more than a threefold increase of violent inmates within the California institutions.[13] Additionally, California accepts the more violent offenders from the federal system and other states.[14] One must also add to this California's gang problem which breeds additional violence and tension.[15]

California correctional officials also acknowledge that many of their physical facilities are inadequate to today's needs. The San Quentin and Folsom facilities which house the most serious offenders, were built in 1852 and 1880 respectively, and are indeed the 19th century dungeons the Chief Justice spoke of.[16] It is within these institutions that the various administrative segregation units are placed, housing the most serious management

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[12] Facilities Requirements Plan, California Department of Corrections, April 17, 1980 pp. 2–8, herein referred to as Facilities Plan.
[13] Facilities Plan, p. 2–13 and 2–14.
[14] Deposition of George F. Sumner, p. 21, 22, 26 & 27.
[15] Deposition of George F. Sumner, p. 21 & 26.
[16] California Department of Corrections Program and Planning Report, April, 1978, Volume 1, p. 7.

problems of the system.[17] It is also within these institutions (as well as the general population and other institutions) where double celling has occurred. In San Quentin, the average cell space is *43 square feet,* far below the American Correctional Association (ACA) standards of 60 square feet for *one* person.[18] An inmate in administrative segregation spends the vast majority of his time within his cell, only two hours of exercise a day are allowed.[19] Placing another man in these cramped quarters further sows the seeds for violence.

As we have pointed out above, the population influx is not about to lessen. July of 1977 saw the advent of Determinate Sentencing in California. The legislation whittled away much of the power of the parole board to release inmates except as it pertained to the remaining indeterminately sentenced offenders. The Uniform Determinate Sentence Act of 1976[20] and subsequent legislation has eroded much of a trial judge's sentencing prerogatives. Mandatory prison sentences represent the current legislative vogue. As Howard Way, the California Secretary of the Youth and Adult Corrections

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[17] California Department of Corrections Manual ch. 3600. Section 3601 describes the type of offender who is housed in the administrative segregation units:

"*General Policy.* It is the policy of the department to provide housing separate and apart from the general inmate population for the close supervision and control of inmates who cannot be housed in a general population without unduly endangering institution security or the safety of self or others. Collectively, such housing is defined as administrative segregation. . . ."

[18] See Facilities Plan, p. 4–1 & 5–71 and Deposition of George F. Sumner, p. 4.

[19] Deposition of George F. Sumner, p. 7.

[20] Cal.Stats. 1977, Ch. 1139.

Agency, has stated:

> "In California, we incarcerate more people on earth, except Russia and a few countries in Africa."

Way also pointed out that cells at Folsom and San Quentin are more than 100 years old and do not meet contemporary fire and safety standards.[21]

The California Department of Corrections recognizes the ACA standards as the legitimate reasonable representation of contempory penal philosophy in the United States. They are considered pragmatic rather than "utopian" as petitioner has described them.[22]

Even if one were to assume that the California Legislature will appropriate the funds to build new prisons or remedy the existing ones' problems, enough prison space will not be ready to house the anticipated number of inmates until at least 1986.[23] If the Legislature continues its past course of enacting ever-longer sentences without appropriations to cover their cost, the result will be double celling on a permanent basis. Given the reality of the situation, neither California nor Ohio can rely exclusively on the responsiblity and good will of their

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[21] *Sacramento Bee,* Sunday, January 4, 1981, p. A-22.
[22] Compare Facilities Plan, p. 4–1, *with* Pet'r's Brief. Pg. 26.
[23] INSTITUTION POPULATION PROJECTED (Facilities Plan, pg. 3–18):

Projected as of June 30	Total Population	Male Total	Female Total
1980	23,427	22,125	1,302
1981	24,512	23,170	1,342
1982	25,195	23,835	1,360
1983	25,835	24,445	1,390
1984	26,465	25,035	1,430
1985	26,980	25,520	1,460

respective legislatures.

As it was put by one federal court dealing with the especially sordid situation in Arkansas:

> . . . The obligation of the Respondents to eliminate existing unconstitutionalities does not depend upon what the Legislature may do, upon what Respondents themselves may actually be able to accomplish. If Arkansas is going to operate a penitentiary system, it is going to have to be a system that is countenanced by the Constitution of the United States. (*Holt* v. *Sarver* 309 F.Supp. 385 (D. Ark. 1979).)

Double celling of the most violent offenders in the most decrepit of California prisons is all but certain to increase, given the conditions outlined above. This is so even though the cells in San Quentin and Folsom were designed to house one inmate, not two, and despite ACA standards which provide that an inmate who spends no more than 10 hours per day locked up be housed in cell space of 60 square feet. If locked up in detention for more than 10 hours a day, the area requirement is 80 square feet.[24] Inadequate cell space plus a violent prone population with its attendant problems is precisely what is threatening to spark an Attica or New Mexico-type riot in California.

Clear standards are indispensible for ensuring that conditions in any given institution meet constitutional requirements. In recent years the "totality of conditions" doctrine has emerged as the cornerstone of con-

[24] Facilities Plan, p. 4–11.

stitutional scrutiny of prison conditions because the older and more historical approaches to the adjudication of these claims have proved irrelevant and inadequate.[25] Thus the relevant issue is not whether a given condition or practice "shocks the conscience," or whether disproportionate or excessive punishment is imposed, or whether the challenged practice goes beyond what is reasonably necessary. Rather the primary issue is whether the totality of prison conditions and practices constitute cruel and unusual punishment. (*Id.*, at 902–906, 915.) [26]

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[25] (See, Robbins and Buser, *Punitive Conditions of Prison Confinement: An Analysis of Pugh v. Locke and Federal Court Supervisions of State Penal Administration Under the Eighth Amendment* (1977) 29 Stan.L.R. 893, 901–902; See also *Jackson* v. *Bishop* 404 F.2d 571, 576–579 (8th Cir. 1968).)

[26] See e.g., *Holt* v. *Sarver* 309 F.Supp. 362 (E.D. Ark. 1970) aff'd 442 F.2d 304 (8th Cir. 1971); *Rhem* v. *Malcolm,* 507 F.2d 333 (2d Cir. 1974); *Aikens* v. *Lash,* 371 F.Supp. 482 (N.D. Ind. 1974) aff'd 514 F.2d 55, 534 F.2d 751, 547 F.2d 372; *Barnes* v. *The Virgin Islands,* 415 F.Supp. 1218 (D. V.I. 1976); *Ahrens* v. *Thomas* 434 F.Supp. 873 (WD. Mo. 1977) aff'd and mod. 570 F.2d 286 (8th 1978); *Laaman* v. *Helgemoe,* 437 F.Supp. 269 (D. N.H. 1977); *Miller* v. *Carson* 563 F.2d 741 (5th Cir. 1977); *Williams* v. *Edwards,* 547 F.2d 1206 (5th Cir. 1977); *Campbell* v. *McGruder,* 580 F.2d 521 (D.C. Cir. 1978); *Hardwick* v. *Ault,* 447 F.Sup. 116 (M.D. Ga. 1978); *Jefferson* v. *Southworth,* 447 F.Supp. 179 (D. RI. 1978); *Jordan* v. *Wolke,* 460 S.Supp. 1080 (E.D. Wisc. 1978) Rev'd 615 F.2d 749 (7th Cir. 1980); *Johnson* v. *Levine,* 450 F.Supp. 648 (D. Md. 1978) aff'd 588 F.2d 1378 (4th Cir. 1978); *M.C.I. Concord Advisory Board* v. *Hall,* 447 F.Supp. 398 (D. Mass. 1978); *Nelson* v. *Collins,* 455 F.Supp. 727 (D. Md. 1978) aff'd in part sub nom *Johnson* v. *Levine,* 588 F.2d 1378 (4th Cir. 1978); *Wolfish* v. *Levi,* 573 F.2d 118 (2d Cir. 1978) rev'd in part sub nom *Bell* v. *Wolfish,* 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979); *Burks* v. *Teasdale,* 603 F.2d 59 (8th Cir. 1979); *Palmigiano* v. *Garrahy,* 599 F.2d 17 (1st Cir. 1979); *Ramos* v. *Lamm,* 485 F.Supp. 122 (D. Colo. 1979); *Capps* v. *Atiyeh,* 495 F.Supp. 802 (D. Ore. 1980); *Smith* v. *Sullivan,* 611 F.2d 1039 (5th Cir. 1980).)

Examining conditions at the Mississippi State Prison, the Fifth Circuit Court of Appeal noted: "Each factor separately . . . may not rise to constitutional dimensions; however the effect of the totality of these circumstances is the infliction of punishment on inmates violative of the Eighth Amendment . . ." (*Gates* v. *Collin,* 501 F.2d 1291, 1294 (5th Cir. 1979).) Similarly, the totality of condition in an Arkansas prison was found to raise the relevant facts to levels where, together, they achieve a constitutional underpinning: "All of these things exist in combination; each affects the other; and taken together they have a cumulative impact [which constituties] . . . cruel and unusual punishment." (*Holt* v. *Sarver,* 309 F.Supp. 362, 372 (E.D. Ark. 1970) aff'd 442 F.2d 304 (8th Cir. 1971).) And as the Fourth Circuit Court of Appeal noted recently, institutional factors "can reach such proportions that the impact of the aggregate effect amounts to cruel and unusual punishment." (*Johnson* v. *Levine,* 588 F.2d 1378, 1380–81 (4th Cir. 1978).)

The complex nature of prisons gives rise to a myriad of conditions within each prison; these conditions necessarily differ from prison to prison. Only, the totality test allows the courts to account for differences among prisons while still using an objective standard.

B. The Number of Prisoners Housed in a Cell, Its Size, the Amount of Time Spent Confined in it, and the Diversions Offered Are Key Factors Which Must Be Considered in Determining Whether the Totality of Conditions Violates the Eighth Amendment

The size of a prisoner's living space, the time he is confined there, the availability of outside cell activities, and any overcrowding in his cell are all factors to be weighed in determining whether there has been an Eighth Amendment violation.[27] No one factor has been

[27] See *Capps* v. *Atiyeh*, 495 F.Supp. 802, 814 (D. Ore. 1980). A similar analysis was undertaken by this court in affirming the lower court's order in the Arkansas cases. (*Hutto* v. *Finney*, 437 U.S. 678, 686–87, (1978).) It has also formed the basis for rulings in dozens of prison/jail cases in the lower courts. (See e.g., *Campbell* v. *McGruder*, 580 F2d 571 (D.C. Cir. 1978); *Battle* v. *Anderson*, 564 F.2d 388 (10th Cir. 1977); *Williams* v. *Edwards*, 547 F.2d 1206 (5th Cir. 1977); *Detainees of the Brooklyn House of Detention for Men*, 520 F.2d 392 (2d Cir. 1974); *Rutherford* v. *Pitchess*, 457 F.Supp. 104 (C.D. Calif. 1978); *Gates* v. *Collier*, 454 F.Supp. 567 (N.D. Miss. 1978); *Nelson* v. *Collins*, 455 F.Supp. 727 (D. Md. 1978) aff'd in part, sub nom *Johnson* v. *Levine*, 588 F.2d 1378 (4th Cir. 1978); *Stewart* v. *Gates*, 450 F.Supp. 583 (C.D. Calif. 1978) rev'd 618 F.2d 117 (9th Cir. 1980); *MCI Concord Advisory Board* v. *Hall*, 447 F.Supp. 398 (D. Mass. 1978); *Bono* v. *Sabe*, 450 F.Supp. 934 (E.D. Ill. 1978) aff'd in part 620 F.2d 609 (7th Cir. 1980); *Palmigiano* v. *Garrahy*, 443 F.Supp. 956 (D. R.I. 1977) rev'd *Palmigiano* v. *Garrahy*, 599 F.2d 17 (1st cir. 1979); *Pugh* v. *Locke* 406 F.Supp. 318 (MD Ala. 1976) aff'd sub nom *Newman* v. *Alabama*, 559 F.2d 283 (5th Cir. 1977) rev'd sub nom *Alabama* v. *Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978); *West* v. *Lubbock County Comrs. Court*, 444 F.Supp. 824 (N.D. Tex. 1977); *Ahrens* v. *Thomas*, 434 F.Supp. 873 (W.D. Mo. 1977) aff'd in part, mod. in part 570 F.2d 286 (8th Cir. 1978); *Morgan* v. *Sproat*, 432 F.Supp. 1130 (S.D. Miss. 1977); *Anderson* v. *Redman*, 429 F.Supp. 1105 (D. Del. 1977); *U.S. ex rel. Wolfish* v. *United States*, 428 F.Supp. 333 (SD NY 1977) aff'd sub nom *Wolfish* v. *Levi* 573 F.2d 118 (2d Cir. 1978) rev'd sub nom *Bell* v. *Wolfish*, 441 U.S. 520 (1979); *Moore* v. *Janing*, 427 F. Supp. 567 (D. Neb. 1976); *Ambrose* v. *Malcolm*, 414 F. Supp. 485 (SD NY 1976); *Martinez Rodriguez* v. *Jimenez*, 409 F.Supp. 582 (D.P.R. 1976) aff'd 551 F.2d 877 (1st Cir. 1977); *Alberti* v. *Sheriff of Harris County*, 406 F.Supp. 649 (SD Tex. 1975); *Miller* v. *Carson*, 401 F.Supp. 835 (MD Fla. 1975) aff'd in part, mod. in part, 563 F2d 741 (5th Cir. 1977).

found which can sustain a finding of unconstitutionality. Cell size, idle hours, etc. do not individually mandate findings of non-compliance with constitutional requirements. But the courts have unhesitatingly declared that confining two prisoners in a small cell for most of their waking hours, without activity to occupy their time, constitutes cruel and unusual punishment.[28]

It is important for the court to examine the multiplicity of problems which accompany the practice of doubling celling. The deleterious effects of double celling upon an inmate's existence manifest themselves in other areas besides the constant threat of violence. The continuing population increase cuts down on the number and the quality of visiting which is universally acknowledged to provide a basic rehabilitating effect on a prisoner. The reduction and/or elimination of vocational services especially effects the indeterminately sentenced inmate who must demonstrate rehabilitation to

[28] See, e.g., *Burks* v. *Teasdale,* 603 F.2d 59, 63 (8th Cir. 1979); *Johnson* v. *Levine,* 588 F.2d 1378, 1380–1381 (4th Cir. 1978); *Campbell* v. *McGruder,* 580 F.2d 521 (D.C. Cir. 1978); *Duran* v. *Elrod,* 542 F2d 998, 1001 (7th Cir. 1976); *Detainees of the Brooklyn House of Detention for Men* v. *Malcolm,* 520 F.2d 392, 398–99 (2d Cir. 1974); *Ramos* v. *Lamm,* 485 F.Supp. 122, 154–55 (D. Colo. 1979); *Washington* v. *Kelly,* 479 F.Supp 569 (D. Md. 1979); *Burks* v. *Walsh,* 461 F.Supp. 454, 476–77 (WD Mo 1978); *Jordan* v. *Wolke,* 460 F.Supp. 1080, 1086–87 (ED Wisc. 1978) rev'd 615 F.2d 749 (7th Cir. 1980); *Nelson* v. *Collins,* 455 F.Supp. 727, 734 (D. Md. 1978) aff'd sub nom *Johnson* v. *Levine* 588 F.2d 1378 (4th Cir. 1978); *Johnson* v. *Levine,* 450 F.Supp. 648, 656–57 (D. Md. 1978) aff'd 588 F.2d 1378 (4th Cir. 1978); *M.C.I. Concord Advisory Board* v. *Hall,* 447 F.Supp. 398, 404 (D. Mass. 1978); *Jones* v. *Wittenburg,* 440 F.Supp. 60 (N.D. Ohio 1977); *Anderson* v. *Redman,* 429 F.Supp. 1105, 1120 (D. Del. 1977); *Ambrose* v. *Malcolm,* 414 F.supp. 485 (SD NY 1976).

the parole board before it deems one eligible for release. Also, forced idleness contributes to tension within the prison system.[29]

> The lack of rehabilitative programs would, in the face of 'other conditions' be violation of the Eighth Amendment. *Finne* v. *Arkansas Board of Corrections,* 505 F.2d 194 (8th Cir. 1974) commenting on *Holt* v. *Sarver* 309 F.Supp. 363 (E.D. Ark 1970).

One characteristic which specifically holds true for all prisons is the psychological impact of double celling. In 1979, at San Quentin, 26 inmates were admitted to the prison psychiatric ward as a direct result of the mental trauma of double celling.[30] Double celling, whether in lock up or the mainline population presents the risk of increased sexual assaults, bodily injury and possible death.[31] In the lock-up units, the Warden of San Quentin

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[29] Facilitites Plan, p. 4–28

[30] Deposition of George F. Sumner, p. 23.

[31] At p. 3–4 of his declaration in *Wright* v. *Enomoto, supra,* Terry A. Kupers, M.D., describes a prisoner's greatest fears as those of violence and homosexual rape. See also California Department of Corrections Classification Manual ch. 7000 section 7001 (b) & (c) which describes the type of inmate housed at San Quentin:

"(b) This institution provides for department population adjustment. Inmates who cannot be accommodated at other institutions for various reasons are placed at San Quentin. It has therefore been necessary to provide for departmental management cases as well as routine transfers.

(c) There are three security housing units providing a closely supervised program for inmates unable to adjust to the general population. In general, these security housing units will handle a younger, less recidivistic group than the unit at Folsom."

Ch. 6900, section 6903 (A) (4) describes the housing of aggressive masculine-role homosexuals at Folsom:

"(4) Homosexuals. The transfer of aggressive masculine role homosexuals to Folsom is established department policy. Because of this situation, special care must be taken to avoid placement of feminine-role homosexuals in the general population of

has described many inmates as potential killers.[32] In 1979, no murders occurred in the general population, as the violence is "more or less confined to the management control units and security housing units."[33]

Studies show that space and crowding have a definite effect on the mental health of those incarcerated. An increase in social density, a decrease in cell space and/or increase in total institutional population results in a marked rate of mental breakdown, suicide, hypertension and other psychosomatic ailments.[34] Orientation to natural lighting is vital to maintain a diurnal rhythm. Artificial lighting does not provide an adequate substitute but rather, results in disorientation, confusion or psychosis. Many prison cells do not have windows. Also windows across a hallway will not remedy the problem. Lack of proper lighting or inadequate light increase the chances for mental disorder.[35] Add these factors to

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this institution. The exception is in the case of such homosexuals as may be confined in the security housing unit after placements in other segregated units.

Additionally, section 6901 (a) & (b) of the same chapter describe the other type of inmate housed at Folsom prison.

"Section 6901. General Information. (a) Folsom Prison is the only maximum security institution and is designed for the confinement of recidivists in need of intensive custodial supervision. Because of the nature of its facilities, some use is made of the institution for the confinement of severe behavior problem cases who are not responsive to psychiatric treatment.

"(b) A security housing unit is located at this institution for the control and treatment of especially serious behavior problems. While a psychiatrist is assigned to the institution staff, his administrative requirements are such that *a program of intensive treatment cannot be offered.* . . ."

[32] Deposition of George F. Sumner, p. 37.

[33] Deposition of George F. Sumner, p. 36.

[34] Declaration of Terry A. Kupers, p. 5 & 6.

[35] Declaration of Terry A. Kupers, p. 8.

inadequate cell size, fear of physical violence, inadequate cell temperature, intolerable noise levels and the result is ever-increasing potential for an explosion of violence. Men confined in maximum security units have few if any outlets (industry and educational opportunities) to serve as a safety valve to release tension the alternatives are mental breakdown, violence and/or recidivism.

In the case at hand, the district court, after analyzing voluminous evidence, found that the totality of the prisoner's conditions at the Southern Ohio Correctional Facility (SOCF) constituted cruel and unusual punishment. (434 F. Supp. at 1016–17, 1020–21.) While the court found that isolated conditions did not rise to the level of constitutional violations, it nevertheless found the totality of the living situation unconstitutional. (*Ibid.*)

The court specifically found that *within the context* of the "totality of circumstances" present at SOCF, double celling was unconstitutional. Although the court did not detail the exact effect double celling had on SOCF prisoners, it did note that it increased frustration, tension, and acting out behavior and exacerbated problem of idleness and decreased the availability of services. These and other effects of double celling have been recognized by many courts.

As the Eighth Circuit Court of appeal has stated, "it must be recognized that putting two men in such a small cell and keeping them there for long periods of time can produce intolerable tensions and will *almost inevitably*

cause trouble not only to inmates but also to prison personnel." (*Burks* v. *Teasdale, supra,* 603 F.2d at 63; emphasis added.) The district court in *Johnson* v. *Levine* similarly found, on the basis of expert testimony, that "double-celling increases the risk of sexual attacks by one prisoner on another and decreases the ability of prison guards to protect younger and weaker inmates from such homosexual assaults . . . [and leads to a] "constant fear of such assault which amounts to an undue burden placed upon prisoners. . . ." (450 F.Supp. at 656.)

After considering much evidence, including the opinions of several experts, the district court in *Burks* v. *Walsh* found that effects of double celling deprives prisoners of much needed privacy, fosters friction, hostility, and forcible homosexuality. It creates management and security problems. It causes "debilitation" and adversely affects individual efforts at rehabilitation. (*Id.* 461 F.Supp. at 476–77.) Other courts have found a deleterious effect of double celling on the provision of minimally adequate medical care. (See *Campbell* v. *McGruder, supra; Capps* v. *Atiyeh,* 495 F.Supp. 802 (D. Ore. 1980); *Lightfoot* v. *Walker,* 486 F.Supp. 504, 523–24 (S.D. Ill. 1980).) Several have found it causes security problems. (See, e.g., *Nelson* v. *Collins, supra,* 455 F.Supp. at 734.)

In California, the district court recently banned double celling in long term segregation units. (*Wright* v. *Enomoto, supra,* __ F.Supp. __ (N.D. Cal. Nov. 3, 1980, Docket No. C-73-1422 S.A.W.).) The court's decision was based in large part on the testimony of George Sumner, the warden of San Quentin State Prison. Sumner called

double celling "inhuman" because it leads to increased tension and violence, as well as psychological breakdowns. He made reference to the previously-mentioned 26 inmates who had been admitted to the prison psychiatric ward as a direct result of the mental trauma of double celling. Ruth Rushen, Director of the California Department of Corrections, also labelled double-celling an "unhumane" practice. The district court specifically found that double-celling "engenders violence, tension, and psychiatric problems." (*Wright* v. *Enomoto, supra,* at p. 5.)

Thus although confinement of two prisoners in a single cell is not per se unconstitutional, double celling clearly is a key factor entitled to great weight in determining whether an Eighth Amendment violation is proven. The deleterious impact of double celling on the "totality of circumstances" can be pivotal, changing a constitutionally tolerable prison into an intolerable one.

CONCLUSION

The lower court's decision in the instant case represents a detailed constitutionally-supported examination of prison conditions at SOCF. While the court did not find any one specific constitutional infirmity, it did find, after well-reasoned analysis, that the totality of the living situation at SOCF constituted an Eighth Amendment violation. In making its finding, the court was well within the mainstream of the modern judicial approach to resolving Eighth Amendment claims. As the court remarked in *Weems* v. *United States* 217 U.S. 349 " 'the

cruel and unusual punishment' clause of the Eighth Amendment is 'progressive and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by humane justice'." Prisoners are entitled to be physically and mentally secure. The practice of doubling celling with all its attendant problems does not provide this guarantee. Unless its concluson was totally without foundation, it should not be overturned.

Therefore, for the simple and compelling reason that *amicus* does not wish to see official inertia and expediency, left entirely unchecked by federal scrutiny, put where it may cause serious psychological or physical injury to *amicus'* many clients, we respectfully urge that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

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